Dec 11 1876
argument for Dft
Walker 3-344

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~332~~ 135

WASHINGTON COCKLE AND HENRY B. DOX, PLAINTIFFS IN ERROR,

vs.

JAMES W. FLACK AND J. BANISTER HALL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1874.

Dec 16 1876
Argument
for Miller

SUPREME COURT OF THE UNITED STATES.

No. 332.

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1 Pleas in the circuit court of the United States in and for the northern district of Illinois, began and held at the United States court-rooms in the city of Chicago, on Monday, the second day of March, in the year of our Lord one thousand eight hundred and seventy-four, before the Hon. Henry W. Blodgett, district judge, sitting pro tempore, in the absence of the honorable Thomas Drummond, circuit judge, and on Tuesday, March thirty-first, one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth year.

WM. H. BRADLEY, *Clk.*

JAMES W. FLACK AND J. BANISTER HALL
vs.
WASHINGTON COCKLE AND HENRY B. DOX. } Assumpsit.

Be it remembered that on the first day of December, A. D. one thousand eight hundred and seventy-three, the said plaintiffs, by Harding, McCoy, & Pratt, their attorneys, came into the clerk's office of
2 said court, and filed their precipe against said defendants in assumpsit, together with a bond for costs, which read in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, A. D. 1873.

JAMES W. FLACK & J. BANISTER HALL
vs.
WASHINGTON COCKLE, HENRY B. DOX. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this first day of December, A. D. 1873.

HARDING, McCOY & PRATT.

(Endorsed:) Filed Dec. 1, 1873. Wm. H. Bradley, clk.

3 *Precipe.*

In the circuit court of the United States for the northern district of Illinois, December term, 1873.

JAMES W. FLACK, J. BANISTER HALL,
vs.
WASHINGTON COCKLE, HENRY B. DOX. } Assumpsit.—Damages, $10,000.

The clerk will please issue summons as above, and oblige,

HARDING, McCOY & PRATT,
Attys. for Plaintiffs.

CHICAGO, *Decr. 1st*, 1873.

(Endorsed:) Filed Dec. 1, 1873. Wm. H. Bradley, clk.

REC. 332—1

Whereupon a summons issued out of said court; which said summons, and the marshal's return endorsed thereon, are in the words and figures following, to wit:

4 *Summons.*

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Washington Cockle and Henry B. Dox, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December instant, to answer unto James W. Flack and J. Banister Hall of a plea of trespass on the case upon promises, to their damage, as they allege, of ten thousand dollars; and have you then and there this writ.

Witness the Hon. Nathan Clifford, acting Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this first day of December, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

WM. H. BRADLEY, *Clerk.*

5 I served the within writ by reading the same to and in the presence and hearing of Henry B. Dox therein named, on the 1st day of December, A. D. 1873, and upon Washington Cockle therein named, by reading the same to him, and in his presence and hearing, on the 3d day of December, A. D. 1873.

B. H. CAMPBELL,
U. S. Marshal,
By L. O. GILMAN, *Deputy.*

(Endorsed:) Filed Dec. 6. 1873. Wm. H. Bradley, clk.

And afterwards, to wit, on the fourth day of December, one thousand eight hundred and seventy-three, the said plaintiffs filed their declaration against said defendants; which is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court for the December term, 1873.

JAMES W. FLACK & J. BANISTER HALL
vs.
WASHINGTON COCKLE & HENRY B. DOX. } Assumpsit.

6 James W Flack and J. Banister Hall, partners in trade, doing business under the name, firm, and style of "Flack, Hall & Co.," citizens of the State of Maryland, the plaintiffs in this suit, by Harding, McCoy & Pratt, their attorneys, complain of Washington Cockle and

Henry B. Dox, partners in trade, doing business under the name, firm, and style of "Cockle & Dox," citizens of the State of Illinois, and residents of the northern district aforesaid, the defendants in this suit, of a plea of trespass on the case on promises, for that whereas, heretofore, to wit, on the 22nd day of October, A. D. 1872, the said plaintiffs then being commission-merchants, and doing business in the city of Baltimore, in said State of Maryland, and it being part of the business of the said plaintiffs to advance moneys to various persons with which to purchase hogs, pork, and produce for shipment to the plaintiffs, and for sale by them in the course of their said business, and upon and for a commission to be charged thereon by the plaintiffs; and at the said time the said defendants being buyers of hogs and pork-packers in the city of Peoria, in said State of Illinois, a portion of whose business it was to purchase hogs, kill and pack them, and to buy and sell pork, meats, and lard, the said plaintiffs, on the said 22nd day of October, A. D. 1872, at Baltimore, to wit, at the northern district aforesaid, duly wrote and
7 sent to the said defendants, at Peoria, Illinois, to wit, at the district aforesaid, a letter of proposal substantially in the words and figures following, to wit:

"BALTIMORE, *October* 22, 1872.

"Messrs. COCKLE & DOX, *Peoria, Ills.:*

"GENTLEMEN: Your favor of 15th last received and contents noted. The proposition we made you was, as we showed your Mr. Dox when here, the same arrangement we had with Messrs. Tyng & Brotherson both last year and the year before, when they wished to buy more hogs than they could themselves manage. We would remark that the business was not confined to the operation, and we would not be willing to so confine it with you, by which we mean the securing of a regular trade, shipment to be drawn on in regular manner, outside of this special arrangement for the purchase of hogs. We are willing to furnish you with one hundred thousand dollars, as wanted, on the following terms: The money to be applied to purchase of hogs to the extent of eighty per cent., leaving a margin of twenty per cent., to be furnished by you; specific receipts like the one enclosed to be attached to each draft; policies of insurance for full values in our favor and located in good companies, to be deposited with us; we to have
8 full two and one-half per cent. commission on all of the net products of the hogs, whether shipped to us or sold direct by yourselves. If sold by you, a/c and remittance to be made to us immediately; or if funds re-invested by you, the re-investment to be controlled by us in the same manner, or to be an advance on new shipment. The rate of interest on this a/c to be at the rate of ten per cent. per annum, and property not to be carried over sixty days; should you wish to hold longer, one per cent. commission for every thirty days additional, or part thereof, after the first sixty days. This covers the ground of this special arrangement to the extent of one hundred thousand dollars. Regular business to be as heretofore, on which you can draw for ¾ the home value of shipments, for which a separate a/c is kept at seven per cent. per annum interest. We will advance on shipment to our order in New York, and account for in same manner as to this city. In our arrangement with T. & B., there was no provision for carrying, as they wished to sell on arrival, and generally only partly cured; but with others we provide for carrying in this way, i. e., one per cent. additional commission for each thirty days after first sixty days; it would not pay us to carry indefinately for a single commission, and locking up

a large fund. As we do not wish to spread our lines too much (and have others depending on us) in the present uncertain state of
9 finances, we beg you to advise us promptly on receipt of this, whether our proposition is accepted, both by wire and letter, and be pleased to regard both it and the receipt inclosed as confidential. There are very few parties with whom we will enter into such arrangements, but confine ourselves chiefly to a regular business. With you we feel there is a basis of mutual confidence established, and if what we propose is agreeable to you, we shall be happy to consum'ate it. We prefer, for the present at least, confining it to $100,000, though we may be able to do more.

"Hoping that we have been sufficiently explicit, and awaiting your reply, we remain, very truly, yours,

"FLACK, HALL & CO."

Which said letter and proposition was duly mailed to and received by said defendants at Peoria, Illinois, to wit, at the district aforesaid.

And afterwards, to wit, on the 28th day of October, A. D. 1872, at Peoria, Illinois, to wit, at the district aforesaid, the said defendant' having received the said letter of the plaintiffs, duly accepted the proposition contained in said letter, and then and there duly notified the plaintiffs by sending to them to Baltimore a telegraphic dispatch, substantially in the words and figures following, to wit:

"PEORIA, ILL., 28, 1872.

"To FLACK, HALL & CO:

"We accept proposition as stated.

"COCKLE & DOX."

10 And the said defendant', on the said 28th day of October, A. D. 1872, at Peoria, to wit, at the district aforesaid, the said defendant' further accepted the said proposition of the plaintiffs, by writing to them at Baltimore a letter of acceptance, substantially in the words and figures following, to wit:

"PEORIA, ILL., *Oct. 28th*, 1872.

"Messrs. FLACK, HALL & CO., *Baltimore:*

"DR. SIRS: We have y'r favor of 22nd, and note carefully the contents. Would have replied sooner but for absence of writer. The proposition is as understood by the writer, and we accept same, and so telegraph you to-night. We shall not do anything prior to the 15th or 20th prox., and hope business relations may prove mutually advantageous and satisfactory.

"Resp'y, yours,

"COCKLE & DOX.

"We return T. & B. rec'pt, and shall consider the matter as strictly confidential.

"C. & D."

Which said telegraphic dispatch was duly on the date thereof telegraphed to the plaintiffs at Baltimore aforesaid, and was duly received by them, and which said letter of acceptance was, by said defendants, duly mailed to the plaintiffs on the day of the date thereof, and
11 was in due course of mail, to wit, on the 1st day of November, A. D. 1872, duly received by the plaintiffs at the city of Baltimore, to wit, at the district aforesaid.

And the plaintiffs aver that from and after the making of said contract they were at all times ready and willing to perform, and did, on their part, fully perform, the said contract by furnishing to the defendants as wanted by them all moneys provided in and by said contract to be furnished by the plaintiffs for the purposes in said contract mentioned.

And the plaintiffs did, from time to time after the making of said contract, as wanted by said defendants, furnish to said defendants, under the said contract, large sums of money, to wit, the sum of ninety thousand dollars; which said sums of money the said defendant' received and accepted under the said contract, and applied the same towards the purchase of hogs to the extent of eighty per cent. of the price and cost thereof, furnishing, as required by said contract, the remaining twenty per cent. of the cost and price thereof; which said hogs so purchased by the said defendants as aforesaid were by the said defendant', in the course of their said business, killed and cured or packed in the ordinary mode and manner of that trade. And the plaintiffs aver that the nett product of said hogs so purchased, killed, cured, and packed by the defendants was by the said defendants sold and the proceeds of the
12 sales thereof received by the defendants. And the plaintiffs aver that the said defendant', on making such sales of the nett product of said hogs, did not make remittance of the amount thereof or any part thereof to the plaintiffs, but, on the contrary, the said defendants reinvested the proceeds of such sales in other hogs under the said contract, by means whereof such re-investment of the proceeds of the said sales of the product of said hogs first purchased became, under the said contract, a further advance of moneys by the plaintiffs to the defendants, and plaintiffs aver that such re-investment of moneys received for the nett product of the hogs purchased under said contract by the defendants amounted to a large sum, to wit, the sum of two hundred thousand dollars.

And the plaintiffs further aver that the defendants wished to and did hold the hogs so purchased by re-investment as aforesaid for a long space of time, to wit, from the 1st day of January, A. D. 1873, to and until the 15th day of November, A. D. 1873, by reason whereof the plaintiffs became entitled to have and receive, under the said contract, a commission of one per cent. for every thirty days of time after the first sixty days, from the said first day of January, A. D. 1873, until the 15th day of November, A. D. 1873, upon the whole amount of hogs, or the product thereof, so carried as aforesaid. And the plaintiffs aver that afterwards, to wit, on the 15th day of November, A. D. 1873, the said defend-
13 ants sold and delivered the entire product of the hogs so purchased by them as aforesaid, and received the money therefor, by reason whereof the said defendants became liable to pay to the plaintiffs the said sum of ninety thousand dollars so advanced to the defendants by the plaintiffs as aforesaid, and a large amount of money, to wit, the sum of ten thousand dollars, for interest-money due the plaintiffs for the money so advanced under the said contract as aforesaid, and a large sum of money, to wit, the sum of twenty thousand dollars, for commissions due to the plaintiffs under the said contract upon sales of property thereunder, and for carrying the said hogs and the product thereof as aforesaid; and in consideration thereof the said defendant' afterwards, to wit, on the 16th day of November, A. D. 1873, at the district aforesaid, the said defendant' promised to pay the said several mentioned moneys to the plaintiffs on request.

And also for that whereas, afterwards, to wit, on the 30th day of November, A. D. 1873, to wit, at the district aforesaid, the said defend-

ants were indebted to the plaintiffs in the sum of ten thousand ($10,000) for money then and there loaned by the plaintiffs to the defendants at their request;

And in the sum of ten thousand dollars ($10,000) for money then and there received by the defendants for the use of the plaintiffs;

14 And in the sum of ten thousand dollars ($10,000) for money then and there paid by the plaintiffs for the use of the defendants at their request;

And in the sum of ten thousand dollars ($10,000) for work and labor done, and care and dilligence about the same expended by the plaintiffs for the defendants and at their request;

And in the sum of ten thousand dollars ($10,000) for money due to the plaintiffs from the defendants for interest-money due and owing upon divers large sums of money before that time lent by the plaintiffs to the defendants at their request;

And in the sum of ten thousand dollars ($10,000) for money then and there due to the plaintiffs as commissions upon the sale of pork, lard, meats, &c., under the contract set out in the first count of this declaration;

And in the sum of ten thousand dollars ($10,000) for money then and there due from the defendants to the plaintiffs for commissions for carrying hogs, pork, lard, meats, &c., under the contract set out in the first count of this declaration;

And in the sum of ten thousand dollars ($10,000) for money then and there found to be due from the defendants to the plaintiffs on an account then and there stated between them;

And being so indebted, and in consideration of the premises, the said defendants, on the day and year and at the district last aforesaid, promised to pay the said several last-mentioned moneys to the

15 plaintiffs on request.

Yet, though often requested so to do, the said defendants have not paid the said several sums of money in the said several counts of this declaration mentioned, nor any or either of them, or any part thereof, to the plaintiffs, but have hitherto wholly neglected and refused so to do, and still neglect and refuse so to do, to the plaintiffs' damage ten thousand dollars; and therefore he brings suit, &c.

HARDING, McCOY & PRATT,
Plffs.' Attys.

16 *Copy of account sued on in this court.*

JAMES W. FLACK ET AL.
vs.
WASHINGTON COCKLE ET AL.

Messrs. Cockle & Dox in ⅜c with Flack, Hall & Co.

			Days.	Int.	
1872.					
June	13	To cash p'd sight draft	470	261 11	$2,000
Dec.	31	" " "	269	224 17	3,000
1873.					
Jan'y	2	" " "	267	222 50	3,000
	3	" " "	266	591 11	8,000
	4	" " "	265	147 21	2,000
	6	" " "	263	292 21	4,000
	7	" " "	262	363 89	5,000
	8	" " "	261	145	2,000
	10	" " "	259	431 66	6,000
	11	" " "	258	358 33	5,000
	13	" " "	256	397 79	7,000
	15	" " "	254	352 78	5,000
	20	" " "	249	345 83	5,000
	21	" " "	248	344 45	5,000
	25	" " "	244	338 89	5,000
	27	" " "	242	336 11	5,000
Feb'y	3	" " "	235	652 78	10,000
	8	" " "	230	638 89	10,000
	15	" " telegram	223		75
Ap'l	12	Com's, their statement, 93,591.92, due Feb. 10	228	148 18	2,339 80
June	30	Com's, their statement $38,478.15	88	23 52	961 95
Sept.	26	" " " 12,012 56			300 30
"	"	Extra com's, $80,639.51, per cent			1,969 79
"	"	Interest this date		6,616 41	6,616 41
		Credits			$104,189

17			Days.	Int.	
1872.					
June	4	By balance ⅜c ren'd	479	271 83	$2,043 46
	8	" overcharge freight	475	1 45	11 13
	18	" error of int. ⅜c, June 4	479	1 33	10
				$274 61	$2,064 59

			Days.	Int.		
		To am't bro't forward..	.....	.....	.....	$104, 189
		By " " " ..		274 61	$2, 064 59	
1873.						
Jan'y	31	Proceeds sales ren'd.....	238	170 70	2.582 75	
Feb'y	14	" " "	221	347 64	5, 663 28	
	27	" " "	207	64 07	1, 114 40	
M'ch	24	Cash remit'd	186	361 66	7, 000	
	31	" "	179	348 05	7, 000	
Ap'l	26	" "	153	340	8, 000	
May	3	Proceeds sales ren'd.....	147	486 65	11, 918 23	
	6	Cash remitted.....	143	317 79	8, 000	
June	10	Proceeds sale ren'd.....	127	239 40	6, 786 32	
	"	" "	109	315 90	10, 433 39	
	17	" "	100	350 54	12, 619 23	
	21	Claim p'd by R. R. this date.	97	69	25 66	
Aug't	26	Cash remitted	28	77 78	10, 000	
Sept.	26	Int. to this date.....	.....	3, 695 48	3, 695 48	
						96, 903 33
		Balance due.....	.....	.....	.....	$7, 285 67

FLACK, HALL & CO.

SEPTEMBER 26, 1873.

18 JAMES W. FLACK & J. BANISTER HALL } Assumpsit.
vs.
WASHINGTON COCKLE, HENRY B. DOX. }

The foregoing is the itemized account sued for in the above-entitled cause.

HARDING, McCOY & PRATT.

JAMES W. FLACK ET AL. } Circuit court.
vs.
WASHINGTON COCKLE ET AL. }

The contract sued on in this cause is set out in the first count of the declaration filed herein.

HARDING, McCOY & PRATT,
Pl'ff Attys.

CHICAGO, *Decr.* 4, 1873.

(Endorsed:) Filed Dec. 4, 1873. Wm. H. Bradley, clk.

19 And afterwards, to wit, on the seventeenth day of December, in the year last aforesaid, the said defendants, by their attorneys, come and file their plea, together with a stipulation; which plea and stipulation read in the words and figures following, to wit:

Plea & stipulation.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court, December term, A. D. 1873.

WASHINGTON COCKLE AND HENRY B. DOX
ats.
JAMES W. FLACK ET AL. } In assumpsit.

And the defendants, by Ingersoll, Puterbaugh Bros. & McCune, their attorneys, come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the plaintiffs have in their declaration thereof complained against them. And of this they put themselves upon the country, &c.

By INGERSOLL, PUTERBAUGH BROS & McCUNE,
Their Attys.

It is stipulated between the parties that either may give in
20 evidence, under the above plea, any matter that they might if the same was legally and specially pleaded, and issue joined thereon.

CHICAGO, ILL., *Dec. 17th*, 1873.

INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Attys. for Defts.
HARDING, McCOY & PRATT, *Attys. for Plaintiffs.*

(Endorsed:) Filed Dec. 17, 1873. Wm. H. Bradley, clk.

21 Afterwards, to wit, on the 26th day of February, A. D. 1874, in the December term, A. D. 1873, of said court, in the record of the proceedings thereof, in said-entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Jury empaneled.

JAMES W. FLACK ET AL.
vs.
WASHINGTON COCKLE ET AL. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Charles Cherry, George Bristol, G. W. Green, S. S. Anderson, J. G. Demerest, W. F. Kinzey, D. G. Bean, John A. Pinches, B. Robinson, J. R. Walker, O. Heath, and Theodore F. Swan, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 27th day of February, A. D. 1874, in said December term, A. D. 1873, of said court, in the record of
22 the proceedings thereof in said-entitled cause appears the following entry, to wit:

JAMES W. FLACK ET AL.
vs.
WASHINGTON COCKLE ET AL. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: "We, the jury, find the issue for the plaintiffs, and assess their damages to the sum of seven thousand four hundred and thirty-three dollars and eighty-two cents."

And thereupon the defendants, by their attorney, move the court for a new trial herein.

23 Afterwards, to wit, on the 31st day of March, in the adjourned March term of said court, A. D. 1874, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, judge, appears the following entry, to wit:

Judgment, &c.

JAMES W. FLACK & J. BANISTER HALL
vs.
WASHINGTON COCKLE & HENRY B. DOX. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of counsel, the court being sufficiently advised therein and intimating an opinion, the plaintiffs by their attorney enter a remittitur upon the verdict herein in the sum of three hundred and seventy-nine dollars and thirty-four cents, and thereupon the court overrules said motion and awards judgment.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendants the sum of seven
24 thousand and fifty-four dollars and forty-eight cents, being the amount of the verdict less the remittitur aforesaid, together with their costs and charges by them in this behalf expended, amounting to the sum of fifty-one dollars and five cents, and that they have execution therefor.

25 And afterwards, to wit, on the thirty-first day of March, in the year last aforesaid, the said defendants came and filed the following bill of exceptions, which is in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States for the northern district of Illinois, term, 1873.

JAMES W. FLACK AND J. BANISTER HALL
vs.
WASHINGTON COCKLE AND HENRY B. DOX. } Assumpsit.

Be it remembered that on the trial of this cause in this term, the defendants, under the plea of general issue and stipulation, relied upon

the transaction between the parties being usurious, and the plaintiffs, to maintain the issues on their part, read in evidence, without objection, the following letter:

"JAMES W. FLACK. J. BANINSTER HALL.

"OFFICE OF FLACK, HALL & CO.,
"COMMISSION MERCHANTS, No. 5 SPEAR'S WHARF,
"*Baltimore, October 22nd*, 1872.

Messrs. COCKLE & DOX, *Peoria, Ill.:*

GENTLEMEN: Your favor of 15th inst. received, and contents noted. The proposition we made you was, as we showed your Mr. Dox when here, the same arrangement we had with Messrs. Tyng & Brotherson, both last year and year before, when they wished to buy more hogs than they could themselves manage. We would remark that the business was not confined to this operation, and we would not be willing to so confine it with you, by which we mean the securing of a regular trade, shipments to be drawn on in regular manner outside of this special arrangement for the purchase of hogs.

We are willing to furnish you with one hundred thousand dollars as wanted, on the following terms: the money to be applied to purchases of hogs to the extent of eighty per cent., leaving a margin of twenty per cent. to be furnished by you. Specific receipts like the one enclosed to be attached to each draft. Policies of insurance for full value in our
27 favor, and located in good companies, to be deposited with us. We to have full two & one-half per cent. commissions on all of the net products of the hogs, whether shipped to us, or sold direct by yourselves. If sold by you, a/c and remittance to be made to us immediately; or if funds re-invested by you, the re-investment to be controlled by us in the same manner, or to be an advance on new shipments. The rate of interest on this account to be at the rate of ten per cent. per annum, and property not to be carried over sixty days; should you wish to hold longer, one per cent. commission for every thirty days additional, or part thereof, after the first sixty days. This covers the ground of this special arrangement to the extent of one hundred thousand dollars.

"Regular business to be as heretofore, on which you can draw for ¾ the home value of shipments, for which a separate a/c is kept at seven per cent. per annum interest. We will advance on shipments to our order in New York, and account for in same manner as to this city. In our arrangement with H. B. there was no provision for carrying, as they wish to sell on arrival, and generally only partly cured; but with others we provide for carrying in this way, i. e., one per cent. additional commission for each thirty days after first sixty days; it would not pay us to carry indefinately for a single commission, and locking up a large fund.

28 As we do not wish to spread our lines too much (and have others depending on us) in the present uncertain state of finances, we beg you to advise us promptly on receipt of this, whether our proposition is accepted, both by wire and letter, and be pleased to regard both it and the receipt enclosed as confidential. There are very few parties with whom we will enter into such arrangements, but confine ourselves chiefly to a regular business. With you we feel there is a basis of mutual confidence established, and if what we propose is agreeable to you, we shall be happy to consum'ate it. We prefer for the present, at least, confining it to $100,000, though we may be able to do more.

Hoping that we have been sufficiently explicit, and awaiting your reply, we remain,

"Very truly yours,

"FLACK, HALL & CO."

And the plaintiffs further to maintain the issue on their part, read in evidence, without objection, the following telegraphic dispatch and letter replying to the above:

"Dated PEORIA, ILL, *October* 28, 1872.

"To FLACK, HALL & Co.:

"We accept proposition as stated.

"COCKLE & DOX."

29 "PEORIA, ILL., *October* 28, 1872.

"Messrs. FLACK, HALL & Co., *Baltimore:*

"GENTLEMEN: We have your favor of the 22nd inst., and note carefully the contents. Would have replied sooner but for the absence of the writer.

"The proposition is as understood by the writer, and we accept the same, and so telegraphed you to-night. We shall not do anything prior to the 15th or 20th prox., and hope business relations may prove mutually advantageous and satisfactory.

"Respectfully yours,

"COCKLE & DOX.

"We return F. & B. receipt and shall consider the matter as strictly confidential.

"C. & D."

And the plaintiff further to maintain the issues on their part read in evidence to the jury the following statement of account, which was read and received in evidence without objection, except as to the items and amounts underscored, (or italicized,) these items being admitted to be the only matters in controversy in this case to wit:

30 *Messrs. Cockle & Dox in ac. with Flack, Hall & Co.*

		Days.	Interest.		
1872.					
June 13	To cash paid st. dft.....	470	261 11	2,000 00	
Dec. 31	" " " " "	269	224 17	3,000	
1873.					
Jan. 2	" " " " "	267	222 50	3,000	
3	" " " " "	266	591 11	8,000	
4	" " " " "	265	147 21	2,000	
6	" " " " "	263	292 21	4,000	
7	" " " " "	262	363 89	5,000	
8	" " " " "	261	145	2,000	
10	" " " " "	259	431 66	6,000	
11	" " " " "	258	358 33	5,000	
13	" " " " "	256	397 79	7,000	
15	" " " " "	254	352 78	5,000	
20	" " " " "	249	345 83	5,000	
21	" " " " "	248	344 45	5,000	
25	" " " " "	244	338 89	5,000	

			Days.	Interest.		
	27	" " " " "	242	336 11	5,000	
Feb'y	3	" " " " "	235	652 78	10,000	
	8	" " " " "	230	638 89	10,000	
	15	" " " telegram	.....	.....		75
Apl.	12	" comn. on $93.591 92, their state-m't ren'd Feb 10.	228	148 18	2,339 80	
June	30	" " " 38,478 15 " " "	88	23 52	961 95	
Sept.	26	" " " 12,012 56 " " "	.....	.....	300 30	
"	"	" "extra 80,639 57 our "(herewith.)	.....	.....	1,969 79	
"	"	" interest to this date	.....	3,616 41	6,616 41	
						104,189 00
31		Cr.				
1872.						
June	4	By balance as pr. a/c rend'd.....	479	271 83	2,043 46	
	8	" overcharged freight from R. R.	475	1 45	11 13	
	18	" error of int. in a/c rend'd June 4.	479	1 33	10 00	
1873.						
Jan'y	31	" proceeds sale rend'd due Jan. 31.	238	170 70	2,582 75	
Feb'y	14	" " " " " Feb'y 17.	221	347 64	3,663 28	
	27	" " " " " Mch. 3.	207	64 07	1,114 10	
Mch.	24	" cash remitted.....	186	366 66	7,000	
	31	" " "	179	348 05	7,000	
April	26	" " "	153	340	8,000	
May	3	" proceeds sale rend'd due May 2	147	486 65	11,918 23	
	6	" cash remitted	143	317 79	8,000	
June	10	" proceeds sale rend'd due May 22.	127	239 40	6,786 32	
	"	" " " " " June 9.	109	315,90	10,433 39	
	17	" " " " " "18.	100	350 54	12,619 23	
	21	"claim of last year pd. by R. R. this date.	97	69	35 66	
Aug.	29	" cash remitted.....	28	77 78	10,000	
Sept.	26	" interest to this date.....	.....	3,695 48	3.695 48	
						96,903 33
		Balance due F. H. &. Co	.....	.....	.....	7,285 67

E. & O. E. Balto., Sept. 26th, 1873.

FLACK, HALL & CO.
FENHAGEN.

32 And to further maintain the issues on their part, the plaintiffs introduced as a witness—

JAMES W. FLACK, one of the plaintiffs, who testified as follows, viz: I am Mr. Flack, of Flack, Hall & Co.; we advanced Cockle & Dox $90,000 altogether. I have a statement of the account before me, (the one above set forth.) I have here the sight-draft for $92,000 drawn by Cockle & Dox; $90,000 to apply on this account under the contract. The other $2,000 was the closing up of the previous year's business. The item in the statement of account of April 12, 1873, is our commission on $93,591.92, as per account of sales of products sold by Cockle & Dox, and furnished by them to our firm. The next item of June 30, 1873, is our commissions on $38,478.15, sales made by Cockle & Dox, as

by statement furnished by them to us. The next item, of Sept. 26, 1873, is our commission on $12,012.26, sales made by Cockle & Dox, as by statement furnished by them to us. The next item is extra commissions charged on $80,639.57, as per our statement herewith, $1,969.79. That is the one per cent. commissions after the sixty days had expired. The item of $1,969.79 is the correct amount. We get the amount of $80,639.57 on which this commission was charged, being the amount of product carried beyond sixty days. I have a detailed statement of how this was made up, (referring to the statement.) There was
33 $9,360.40 sold within the sixty days, upon which there was no extra commissions. There were $14,000 sold between sixty and ninety days, upon which there was one per cent. commission charged, amounting to $140. There was $34,704.55 sold between ninety and 120 days, upon which there was two per cent extra commissions charged, of $694.09. There was $23,052.62 sold between 120 and 150 days, upon which there were three per cent. charged, $691.58. There was $8,882.40 sold between 180 and 210 days, upon which there was an extra commission of five per cent. charged, $444.12, making altogether $1,969.79.

On cross-examination:

At the time the first draft of $2,000 was made on us, June 12th, 1872, Cockle & Dox had a balance in our hands of $2,064. After the payment of that draft there was a balance of $64 in their favor, which still remained in our hands at the time the last arrangement went into effect. The total amount we have received from Cockle & Dox in products and remittances was $91,140.26. Cockle & Dox were charged with $6,616.41 interest and credited with $3,695.48 interest, leaving a balance due us on interest ac. of $2,920.93. We credited interest at the same rate we charged. We received from Cockle & Dox in one way or another $91,140.26, leaving a balance on the simple money and interest account due Sept. 26, 1873, to us of $1,780.67 without any reference to commissions or extra charges. As to the items charged for commissions,
34 on the 12th of April, June 30th, and Sept. 26th, 1873, for sales made by Cockle & Dox themselves, we performed no actual services. We gave Cockle & Dox the privilege of selling in Peoria or Chicago themselves, or we selling in Baltimore, which privilege they took under the contract. We were to reserve the commission upon the sale of product the same as though we sold it ourselves. We were ready to make the sales ourselves, we were ready to render these services, but they chose to perform them themselves and render us their accounts for the purpose of charging up three commissions upon them. The services we rendered was to keep our office open, and our business going, and we kept them constantly advised of the markets. We did not keep our office open specially with reference to the business of Cockle & Dox. We were doing a large business, and it was kept open for our entire business. That charge of commissions was not made for the advance of money made by us. We charged interest on our commissions, which is included in the account. It was the custom and usage of the trade to charge this interest upon balance of amount rendered.

The consideration of the money we let Cockle & Dox have was 10 per cent. interest. The advancing of money was to bring their business from which we derived commissions. Our business is a commission business. The putting out of money brings in business as the result of that putting out, but commission is not pay for money put out,
35 only so far as it brings business back. We were to have the business upon which this commission *were* to originate. There was

no actual services rendered by the plaintiffs for the charge in the statement of account, Sept. 26, 1873, of $1,969.79 for extra commissions on $80,639.57. That was a charge made under the stipulation in the contract. Cockle & Dox furnished amount for the purpose of enabling us to charge up commissions upon what they sold of the product that was purchased with the money got of us, & wrote us that our statement of the contract was perfectly satisfactory, & returned the amount asked for, so as to charge up these commissions.

The defendants then introduced in evidence the account of sales rendered by the plaintiffs to the defendants, of the sales made by the plaintiffs, showing that the plaintiffs deducted from the proceeds of sales several items of brokerage, amounting to $167.62, in adition to 2½ per cent. commissions.

The defendants then introduced in evidence the statute of the State of Maryland, article 95, sections 1–5, showing the rate of interest established by law to be six per cent. per annum, and that any person exacting, directly or indirectly, above that rate, is guilty of usury, and that the person so guilty forfeits all interest.

This was all the evidence offered on the trial of said cause.

36 And thereupon the court charged the jury as to the law governing the case as follows:

"As a defense to this claim on the part of the plaintiffs, the defendants urged the plea of usury. It is proper that the court should say to you in the outset that this is a plea not highly favored in the law. The party seeking to defend against a claim on the ground of usury is held bound to make strict proof, and it is not the duty of the jury to presume that usury or a usurious contract was intended, where a contrary presumption can be as fairly drawn from the surrounding facts and circumstances in the case; in other words, if a contract is susceptible of an innocent solution showing that the parties did not intend to violate the law, it is the duty of the jury to give the innocent solution, which will exclude the idea of an intention to take usury, where it can be as readily done from all the circumstances, as to assume that usury was intended. The position of the defendant is, that the reservation of commissions on the goods sold by the defendants themselves have a colorable shift and pretext to evade usury laws, and obtain a greater rate of interest than is allowed by law. Whether this contract was usurious or not is a question of fact to be determined by you from all the evidence in the case throwing light upon the real intentions of the parties. In passing upon this question,

37 you should carefully examine the contract itself in the light of all the surrounding circumstances. You should consider the business of the parties, plaintiffs and defendants; the fact that the business of the plaintiffs made charge of commission for goods sold by them a legitimate and proper one when not excessive or exorbitant, or resorted to as a mere color; that the business of the defendants required the advance to them of large sums of money in a business somewhat precarious in itself, and where it was necessary to give credit to the personal integrity and business ability of the defendants, and that it is also conceded as one of the controlling principles in this case, that the stipulation for commissions on such of the goods as the plaintiffs themselves sold or controlled the selling of, was in no way prohibited by the law, and did not infringe upon the usury laws, unless, of course, such stipulation for commissions was exorbitant or unusual; and I will here say, unless I might overlook it, as it is not in my notes, that if it is claimed that the contract is usurious, and the reservation of commissions colorable only by reasons of the fact that such commissions are unusual or ex-

orbitant or unreasonable, the burden of proof of showing such unreasonableness is upon the party alleging it, and upon the party pleading the usury. It was the defendants' duty to have shown, if they had intended to rest their case upon the fact that the commissions re-
38 served in this case are unreasonable—they should have shown their unreasonableness by showing what were reasonable commissions for such services in the place where the services were rendered."

Mr. INGERSOLL. We claim that where they sold the property, two and a half per cent. was reasonable.

The COURT. The plaintiffs undoubtedly had a right to insist, as a condition on which they would loan the money, that the products of the hogs should be shipped to them, and that they should be allowed to sell it, and receive their reasonable commissions therefor; and unless the proof shows that the commissions stipulated for in this case were unreasonable and excessive, which fact the defendants are bound to prove, then the contract ought not to be considered usurious by reason of the stipulation for a commission to the plaintiffs for goods actually sold by them. So far as the stipulation for commissions on goods sold by the defendants, and extra commissions for carrying beyond sixty days are concerned you may with propriety consider, for the purpose of arriving at the intentions of the parties, that the plaintiffs had the right to insist upon the selling of the entire product of the hogs purchased, if they chose to do so; and also that it should be sold within a
39 stipulated time as a condition upon which they would advance money; and it is worthy of consideration whether the clause allowing the plaintiffs commissions, whether they or the defendants did the selling, was not probably so drawn for the accommodation of the defendants, so that the defendants might choose their own market, giving the plaintiffs for that privilege the commissions, or, in other words, that the defendants packing the hogs, purchased with the plaintiffs' money, and being interested to the extent of twenty per cent. in the investment, were to a certain extent entitled to choose the market in which the product should be sold, and that that privilege was conceded to them on condition that they would allow the plaintiffs the right of drawing their commissions whether the goods were sold by the plaintiffs, or whether the defendants themselves should sell. I say this consideration is worthy of some thought by you in getting at what was the intention of the parties, and what was the real reason for adopting this special clause and provision for allowing the defendants to sell, and at the same time requiring them to pay commissions on sales which they themselves made. The whole contract, together with the surrounding circumstances, must be considered and weighed by you to arrive at the intentions of the parties; because, unless there was an intention to evade the usury laws, the plea of usury is not made out; and if, from all the evidence in the case, you come to the
40 conclusion that there was an intention to evade the usury laws of the State, or the State of Maryland, or both, and that the stipulations for commissions were merely a colorable device to give the plaintiffs a higher rate of interest than was allowed by law, then you should find the contract usurious, and no interest or commissions should be allowed; while, on the contrary, if you are satisfied from all the evidence in the case, that the stipulation for commissions to be paid the plaintiffs was according to the usual course of trade, and that the plaintiffs gave the defendants the right to sell the goods for the defendants' convenience; and, as a waiver of their own right, to have the

goods come to them, and into their own possession, and that the commissions reserved were reasonable, then the contract is not necessarily usurious; the essence of usury being an intent to evade the usury laws. The option, if you so find it, given the defendants to sell the goods themselves in such market as they might choose, instead of sending them to the plaintiffs to be sold, conditioned only that the plaintiffs should receive their commissions, does not of itself necessarily render the contract usurious. You must, in other words, be satisfied that there was an intention, as I have already repeated, to evade the usury laws, and that the payment of commissions was resorted to solely as a means of increasing the amount of interest; that if the sale of the product of the hogs packed was in the direct line of the
41 business of the plaintiffs, and they were willing and ready to have made the sale, then there was nothing necessarily in such a contract which implies usury. You are therefore, if you imply it at all, to deduce it from all the facts and surrounding circumstances in the case; so, too, the clause in the contract providing for one per cent. on every extension of thirty days beyond the first sixty for carrying the product of the hogs purchased, may not necessarily be considered as usury, because it was undoubtedly intended in the nature of a penalty to enforce a speedy sale of the property in order that the money may be invested, a practical application of the old adage of a nimble sixpence being better in trade than a slow shilling. It was a device to which the parties had a right to resort for the purpose of securing a speedy sale, and does not necessarily, as I said before, imply usury. You must deduce that yourselves from all the circumstances in the case. As I said before, the intention of the parties is the of the offence, and that is left solely for you."

To the above charge of the court, the defendants excepted and still except.

The court further charged the jury in these words: I will say further to you, gentlemen of the jury, that if you are satisfied, from
42 all the evidence of the case, that the defendants have vexatiously held the amount, any amount, which was due to the plaintiffs, you will be justified in computing interest at six per cent. on that from the time that the account was rendered and the demand accrued, which was the 26th of September last, as I understand.

The defendant' excepted to the charge of the court in that behalf.

And thereupon the jury rendered a verdict against the defendant', and assessed the plaintiffs' damages at seven thousand four hundred and thirty-three $\frac{82}{100}$ dollars, ($7,433.82.) Whereupon the defendant' moved the court for a new trial in said cause by reason of the said supposed misdirections of the court, so given as aforesaid to the jury; and because the damages assessed by the jury as aforesaid, were excessive; and because the verdict of the jury was contrary to the law and evidence in the case. And thereupon the plaintiffs, by leave of the court, entered a remission of the sum of three hundred and seventy-nine $\frac{34}{100}$ dollars ($379.34) from the amount of damages so assessed by the jury, (being the item of $167.62 brokerage charged in addition to commissions on sales made by the plaintiffs in New York, and interest charged on commissions in the statement of account of $171.70, and $40.02 interest difference in mode of calculating interest.) Thereupon the court
43 overruled the said motion for a new trial and gave judgment upon the verdict of the jury, after directing the deduction of the amount of said remission, whereupon the defendants made their exception to the said rulings of the court in that behalf; and inasmuch

as the matters aforesaid do not appear of record, the defendants tender this their bill of exceptions, and pray that the same may be signed and sealed by the judge of this court, which is done accordingly, this 31st day of March, in the year 1878.

H. W. BLODGETT, *Judge.* [L. S.]

(Endorsed:) Filed March 31st, 1874. Wm. H. Bradley, clk.

44 And afterwards, to wit, on the fifteenth day of April, A. D. one thousand eight hundred and seventy-four, the said defendants filed the following supersedeas bond, which is in the words and figures following, to wit:

Bond.

Supreme Court of the United States.

JAMES W. SLACK AND J. BANISTER HALL } *vs.* WASHINGTON COCKLE & HENRY B. DOX. } Assumpsit.

Circuit court of the United States for the northern district of Illinois.

Know all men by these presents, that we, Washington Cockle, Henry B. Dox, & John C. Proctor, all of the city and county of Peoria, in the State of Illinois, are held and firmly bound unto James W. Flack and J. Banister Hall, partners under name and style of Flack, Hall & Co., of the State of Maryland, in the sum of twelve thousand dollars, ($12,000,00,) to be paid to the said James W. Flack and J. Banister Hall, their executors or administrators, to which payment, well and truely to be made, we bind ourselves, and each of us, jointly and
45 severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this thirteenth day of April, A. D. 1874.

Whereas the above-named Washington Cockle and Henry B. Dox have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Washington Cockle and Henry B. Dox shall prosecute their said writ of error to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WASHINGTON COCKLE. [SEAL.]
HENRY B. DOX. [SEAL.]
JOHN C. PROCTOR. [SEAL.]

Attest:
ROBERT G. INGERSOLL.

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed April, 15, 1874, Wm. H. Bradley, clk.

46 NORTHERN DISTICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United

States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said-entitled cause, wherein said James W. Flack et al. are plaintiffs and said Washington Cockle et al. are defendants, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this first day of October, A. D. eighteen hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

47 *Assignment of errors.*

And now come the said plaintiffs in error, by Ingersoll and Puterbaugh, their attys., and say that there is manifest error in the record of the proceedings in this cause, in this—

First. The verdict of the jury was contrary to law, and against the evidence.

Second. The instructions of the court were contrary to law; were calculated to, and did, mislead the jury.

Third. The court admitted improper and refused to admit proper testimony.

Fourth. The court erred in refusing to set aside said verdict, and in entering judgment thereon, and in refusing to grant a new trial.

Fifth. The judgment is excessive.

Sixth. Other causes.

Wherefore the said plaintiffs in error pray that the said judgment be reversed, &c.

INGERSOLL & PUTERBAUGH,
Attys. for Plffs. in Error.

48 UNITED STATES OF AMERICA, *ss:*

The United States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between James W. Flack and J. Banister Hall, plaintiffs, and Washington Cockle and Henry B. Dox, defendants, a manifest error hath happened, to the great damage of the said Washington Cockle and Henry B. Dox, as by their complaint appears.

49 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said

Supreme Court, the third day of April, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Circuit court U. S., northern district of Illinois. James W. Flack et al. vs. Washington Cockle et al. Writ of error.

50 The United States of America to James W. Flack & J. Banister Hall:

You are hereby cited and admonished to appear at the Supreme Court of the United States, on the second Monday in the month of October, 1874, at the city of Washington, pursuant to a writ of error filed in the clerk's office of the said Supreme Court of the United States, in the cause wherein James W. Flack and J. Banister Hall are defendants in error and Washington Cockle and Henry B. Dox are plaintiffs in error, to show cause, if any you have, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, this the sixth day of
51 October, A. D. 1874.

H. W. BLODGETT, *Judge.*

We acknowledge service of the above and foregoing citation this 6th day of October, A. D. 1874.

HARDING, McCOY & PRATT.

(Indorsed:) Washington Cockle, Henry B. Dox, plffs. in error, vs. James W. Flack, J. Banister Hall, defts. in error. Citation.

(Indorsement on cover:) No. 332. Washington Cockle and Henry B. Dox, plaintiffs in error, vs. James W. Flack and J. Banister Hall. N. Illinois C. C. U. S. Filed 13th October, 1874.

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Supreme Court of the United States.

DECEMBER TERM A. D. 1876.

No. 332.

WASHINGTON COCKLE AND HENRY B. DOX,
Plaintiffs in Error,
vs.
JAMES W. FLACK AND J. BANNISTER HALL.

Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

ROBERT G. INGERSOLL,
Counsel for the Plaintiffs in Error.

Transcript Company, Printers, Peoria, Ill.

Supreme Court of the United States.

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vs.
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Error to the Circuit Court of the United States, for the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

In the fall of 1872, the plaintiffs in error entered into a contract with Flack & Hall, which said contract is set out on the 3d and 4th pages of the record.

Flack & Hall were to furnish the plaintiffs in error with $100,000 as wanted. The plaintiffs then being engaged in packing pork. The money received from defendants in error was to be applied to the purchase of hogs to the extent of at least eighty per cent. of the amount furnished, twenty per cent. of the amount to be furnished by the plaintiffs in error, the product to be insured for full value in favor of Flack & Hall, the policies to be deposited with them. Flack & Hall were to have two and one-half per cent. commission on all of the net products of the hogs, whether the same was shipped to them or sold direct by the plaintiffs in error. If sold by the plaintiffs in error, the remittances to be made to Flack & Hall immediately, and if the funds were reinvested by plaintiffs in error, the reinvestment was to be controlled by Flack & Hall, and was to be considered as an advance on a new shipment. The rate of interest on this account was to be at the rate of ten per cent. per annum. The product not to be carried over sixty days. If the product was carried for a longer time than sixty days, then one per cent. commission for every thirty days additional or part thereof after the first sixty days. This covered a special arrangement to the extent of $100,000. The regular business to be as it had been theretofore, the plaintiffs in error drawing for three-fourths of the home value of the shipments on Flack & Hall, for which a separate account was kept, at seven per cent. per annum.

The contract or arrangement left the regular business as it had been, and applies only to the fur-

nishing of the $100,000, for which they were to receive ten per cent. interest.

The Court will observe that, at the time this contract was made, the plaintiffs in error were doing a regular business with Flack & Hall, were buying, packing, and shipping to the defendants in error at Baltimore, and the contract, to which especial attention has been drawn, was made simply with reference to an advance by Flack & Hall of $100,000. For this advance of $100,000, Flack & Hall asked

1st. Interest at the rate of ten per cent. per annum.

2d. That the plaintiffs in error should furnish at least $20,000 more, to be used with the $100,000 in the purchase of hogs.

3d. That the product be insured for its full value in favor of Flack & Hall.

4th. Flack & Hall to have full two and one-half per cent. commissions on all the net product of the hogs, whether shipped to them or sold direct by Cockle & Dox.

5th. If sold by Cockle & Dox, the proceeds to be remitted immediately to Flack & Hall, unless re-invested in hogs by Cockle & Dox; and, if so, the re-investment to be controlled by Flack & Hall, and to be treated as an advance on a new shipment.

6th. One per cent. extra commissions for every thirty days additional or part thereof, after the first sixty days that the product might be carried.

The question is, was this an arrangement by which Flack & Hall got, and intended to get, a greater rate of interest than was allowed by law? Did they perform any other service than simply loaning the money?

The Court will remember that at the time this $100,000 was advanced, Cockle & Dox were doing a regular business with Flack & Hall, and that Flack & Hall were doing a regular business with many other customers.

It cannot be pretended that on account of the $100,000 loaned, Flack & Hall kept any office in Baltimore, or informed Cockle & Dox as to market rates. That was a part of their duty under the regular business. Flack & Hall are not satisfied with ten per cent. interest on their $100,000, but they insist that $20,000 more shall be put with the $100,000 by Cockle & Dox, and that then they (Flack & Hall) shall have two and one-half per cent. commission on the product purchased with the $120,000, and that they shall have this commission even when all the services are performed by Cockle & Dox. In other words, Cockle & Dox buy $120,000 worth of hogs and sell the product say for $120,000 direct; upon this, in addition to the ten per cent. interest according to this contract, Flack & Hall are entitled to two and one-half per cent. commission. That is to say, a commission of $3000. Should Cockle & Dox again invest the $120,000 in hogs, and again sell direct for $120,000, Flack & Hall would again be entitled to two and one-half per cent. commission, and so on, just as long

as Cockle & Dox continued to buy and continued to sell, Flack & Hall, in the meantime, rendering no services except the original loan of $100,000.

This is exactly in effect what happened, according to the account.

On page 7 of the record, under date of April 12th, and February 10th, the commissions charged amount to $2,339.80, under date of June 30th the commissions amount to $961.95, under date of September 26th to $300.30, and under same date extra commissions $1,969.79. In addition to all this, interest is charged upon these commissions at the rate of ten per cent. per annum.

As a matter of fact, according to the testimony of Flack, on page 13 of the record, Flack & Hall advanced to Cockle & Dox only $90,000 in all; and Mr. Flack admits that the item under date of April 12th, 1873, amounting to $2,339.80, is composed of commissions charged by Flack & Hall on sales of products made by Cockle & Dox, and with which Flack & Hall had nothing to do; Mr. Flack also admits that the next item, of June 30th, 1873, found on page 7 of the record, and amounting to $961.95, is of precisely the same character, that is to say, commissions on sales made by Cockle & Dox, and with which Flack & Hall had nothing to do; and that the next item, under date of September 26th, of $300.30, is exactly of the same character; he also admits that the next item, under date of September 26th, extra commissions, is made up of the one per cent. commissions after sixty

days had expired, amounting in all to $1,969.79. In other words: They received ten per cent. per annum upon all this amount, and in addition thereto charge two and one-half per cent. on the sales made by Cockle & Dox, and in addition thereto one per cent. upon all amounts carried beyond sixty days; Flack also admits that, at the time the first draft of $2,000 was made by Cockle & Dox, June 12th, 1872, they (Cockle & Dox) had a balance in the hands of Flack & Hall of $2,064, and after the payment of that draft, a balance of $64, in favor of Cockle & Dox, in the hands of Flack & Hall; he also admits that, so far as sales are concerned made by Cockle & Dox, Flack & Hall performed no actual services; he further admits that no services were rendered by the plaintiffs for the charge of one per cent. after sixty days, extra commissions, amounting to $1,969.79; that that was simply a charge made under the contract.

We therefore claim that the items, $2,339.80, $961.95, $300.30, $1,969.79, should be deducted, and that Flack & Hall were not entitled in law to make said charges, as they performed no services therefor, and said items are simply based upon a device by means of which Flack & Hall endeavored to receive a greater rate of interest upon money advanced, than they by law were entitled to.

We further claim that said contract was made in the state of Maryland, and upon the trial below we introduced the statutes of Maryland, viz: *Article 95, sections 1 and 5*, in which the rate of interest is established by the law to be six per cent. per annum; and

it is further provided by the said statute that any person exacting, directly or indirectly, more than that rate, is guilty of usury, and that the person so guilty shall forfeit all interest.

Deducting from the account of Flack & Hall the items alluded to, amounting in the aggregate to $5,739.46, would leave due Flack & Hall $1,315.02, if by said contract all interest is not forfeited. But in any event, Flack & Hall are not entitled to more than $1,315.02, according to their own showing.

I.

WAS THE CONTRACT USURIOUS?

No matter what the form of the contract may be if, in fact, after all, it is simply a loan at an usurious rate of interest, we suppose the Court bound by the decisions of the State of Maryland, as to this contract being usurious.

Wetter vs. Hardesty, 16 Md., 11.

"If the form a transaction takes be given to it for the purpose of avoiding the statute against usury, when in fact it was a loan at an usurious rate of interest, it must be regarded as but a shift and device condemned by the law."—*Ib.*

Anderson vs. Poe, 30 Md., 137;
Scott vs. Leary, 34 Md., 399;
Bandell vs. Isaac, 13 Md., 202;
Scott vs. Lloyd, 9 Peters, 418;
State of Ohio vs. Taylor, et al., 10 Ohio, 381.

In the case last mentioned James Taylor borrowed from the Fund Commissioners of Muskingum county $25,000 of the surplus revenue of the United States deposited in the State of Ohio. He executed his bond in the form required by law, at the same time he executed a warrant of attorney, confessed judgment for the amount at seven per cent. per annum, and five per cent. in addition, being the fees paid by the State to its attorney for the collection of costs; he at the same time executed a mortgage to the State, the condition was that he should pay the sum so borrowed and the attorney's fees, not exceeding five per cent. The bill was filed to subject the mortgaged premises to sale, and a decree *pro confesso* rendered against Taylor; the land was sold, the money brought into Court; the counsel for the complainant moved to tax the attorney's fees, as by the agreement of the parties that became a part of the costs. This motion was overruled and appeal was taken by the complainant. Upon the hearing in the Supreme Court, the Court used the following language: "However it may be disguised it is very clear to us that it is a mere shift or device by which twelve per cent. is retained as interest upon this loan, and in this view of the case cannot be enforced. It would be the condition of future loans at banks that the borrower should pay the expenses of collection, and perhaps the tax thereon. The brokers in this State would hold a general jubilee, and as their sense of morality and law usually expands with their hopes of gain in proportion to the borrower's necessity, they would find probably additional items of costs

as the means of legalized extortion upon their loans. In our opinion such agreements are against the public policy of the country, and ought not to be enforced in Courts of justice."

Burton vs. Blin, 23 Ver. 151;
Hewett vs. Dement, 57 Ill. 500;
Fielder vs. Darrin, 50 N. Y. 437;
Pike vs. Crist, 62 Ill. 461;
Tyng vs. Com. Warehouse Co., 58 N. Y. 313.

Usury in a contract is to be determined by the law of the place where the money is payable. *Railroad Company vs. Bank of Ashland*, 12 Wall. 229. The money in this case was to be paid to Flack & Hall in Maryland, and therefore the contract, so far as usury is concerned, is to be governed by the laws of that state.

II.

AS TO THE CHARGE OF THE COURT.

The Court charged the jury that they should consider the business of the parties, plaintiffs and defendants, and the fact that the business of the plaintiffs in error was somewhat precarious in itself, and that it was necessary to give credit to the personal integrity and business ability of the plaintiffs in error.

Is it possible that where seven per cent. is allowed by law ten per cent. can be charged, under the plea that the person to whom you loan the money

is engaged in a precarious business, or that he is not very good, or that you have to rely upon the personal integrity of the person to whom you loan the money?

The Court also instructed the jury that the stipulation for commissions on such of the goods as the plaintiffs themselves sold or controlled was in no way prohibited by law. This, in our judgment, was calculated to and did mislead the jury. Flack & Hall had no right to charge the commissions unless they performed some services. According to the evidence, they performed no services except the advance of $90,000 for which they received interest at the rate of ten per cent. per annum in addition to these commissions. No services whatever were rendered for these commissions, and it is not and was not for the plaintiffs in error to show by extrinsic evidence that it was unreasonable to charge commissions where no services were performed. If any services had been performed except the simple advance of the money, then it would have devolved upon the plaintiffs in error to show that the charge was unreasonable; but when it appeared from the evidence that no service had been performed, then it did not devolve upon the plaintiffs in error to show that a charge of over $5,000 for doing nothing was unreasonable.

The Court further instructed the jury, "that the plaintiffs undoubtedly had a right, in addition to receiving ten per cent. upon the money loaned as a condition on which they would loan the money, to insist that the product of the hogs should be shipped to them, and they should be allowed to sell it and

receive their reasonable commissions therefor." And the Court also instructed the jury, "that the plaintiffs had the right to insist upon the selling of the entire product, if they chose so to do." And further, "that Cockle & Dox were bound to pay Flack & Hall two and one-half per cent. commission on the products sold by Cockle & Dox."

We believe that where one loans money and charges the legal rate of interest therefor, he has no right to make any other conditions whatever, except such conditions as he may make for the security of the payment of the money and the payment of the interest. If he asks any further compensation, directly or indirectly, it is usurious, and cannot be enforced.

The Court further instructs the jury, "that the essence of usury is the intent to evade the usury laws."

In our judgment, the essence of usury is taking a greater rate of interest than is allowed by law, whether there is any intent to evade the law or not. We don't think it necessary that either of the contracting parties should know that there was any law on the subject of usury in existence; if a greater rate of interest is charged than is allowed by law, the contract is usurious, whether either party intended that it should be or not.

It is perfectly evident in this case that the payment of commissions was resorted to as a means of increasing the amount of compensation for advancing the $90,000.

It was further provided in the contract that when

the property was carried over a certain time then one per cent. should be added. The original contract being to advance at ten per cent. with the stipulation that if they carried it over the certain time, one per cent. per month to be added.

This is justified by the Court below by the old adage that a nimble sixpence is better than a slow shilling. As we understand the law, whenever a sixpence gets so nimble as to draw a greater rate of interest than is allowed by law, its nimbleness becomes usurious.

ROBERT G. INGERSOLL,

Counsel for the Plaintiffs in Error.

Supreme Court of the U. S.

October Term, 1876.

No. 133.

FLACK & HALL, DEFENDANTS IN ERROR,

vs.

COCKLE & DOX, PLAINTIFFS IN ERROR.

In Error to the Circuit Court of the U. S. for the Northern District of Illinois.

BRIEF OF THE DEFENDANTS IN ERROR.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

Supreme Court of the U. S.

October Term, 1876.

No. 133.

FLACK & HALL, *Defendants in Error,*

ats.

COCKLE & DOX, *Plaintiffs in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE U. S. FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF THE DEFENDANTS IN ERROR.

This is an action of assumpsit brought by Flack, Hall & Company, of Baltimore, against Cockle & Dox, of Peoria, Illinois, to recover certain advances, with interest and commissions, alleged to be due to the Baltimore house, under a contract, set forth at length in the first count of the declaration (Rec. p. 344,) and given duly in evidence, (pp. 11 and 12.) The statement of account sued on will be found accompanying the declaration (pp. 7 and 8) and produced in evidence, (pp. 12 and 13.) The general issue was pleaded, with stipulation, &c., (p. 9,) and the only defence relied on thereunder was usury, (pp. 10 and

11.) Under the charge of the Court, a verdict of $7,433.82 was rendered for the defendants in error, (p. 7.) A motion having been made for a new trial, upon the ground of misdirection, excessive damages and verdict contrary to law and evidence, (p. 17,) the defendants in error entered a remission of the sum of $379.39. The Court thereupon overruled the motion, and judgment went accordingly, (p. 17.) The entire charge was excepted to in gross (p. 17) without special exception or specification of error.

Flack, Hall & Co. were commission merchants in Baltimore, and Cockle & Dox were buyers of hogs, and pork-packers, in Peoria. After a personal interview between the parties in Baltimore, followed by a letter from the Peoria to the Baltimore house, the latter formalized a proposition by letter, under date of October 22d, 1872, (p. 11,) which was accepted on October 28 by letter and telegram, (p. 12.) It provided for an advance of $100,000 by Flack, Hall & Co. as wanted, to be applied by Cockle & Dox to purchases of hogs, to the extent of eighty per cent., leaving a margin of twenty per cent. to be furnished by Cockle & Dox. Flack, Hall & Co. were to have two and one-half per cent. commissions on all of the net products of the hogs, whether shipped to them or sold directly by Cockle & Dox. If sold by the latter, remittances were to be made immediately, or, if the funds were reïnvested by Cockle & Dox, the reïnvestment was to be on the same terms. The rate of interest was to be ten per cent. per annum, the property not to be carried over sixty days, or, if held longer at the desire of C. & D., one per cent. commission was stipulated to be paid for every thirty days additional, or part thereof, after the first sixty days.

There was no question made at the trial in regard to the amount of advances, which reached $90,000 altogether, (p. 13.) The items, which were objected to, will be found underscored in the account, (pp. 12 and 13,) and it is admitted (p. 12) that they are the only matters in controversy. They are charges of

interest and commissions. How they were arrived at will be seen by reference to the testimony of James W. Flack, (pp. 13, 14 and 15.)

The plaintiffs in error offered no facts in evidence except an account of sales rendered to them by the Baltimore house, in which several items of brokerage, amounting to $107.72, in addition to commissions, appeared to have been charged. This item, together with $171.70 interest charged on commissions, and $40.02 supposed excess in the calculation of interest, were remitted on the motion for a new trial.

The plaintiffs in error put in evidence nothing further, except the provision of the Maryland Code, limiting interest to six per cent. and forfeiting the excess over that rate. (1 Md. Code, 696, art. 95, sections 1 to 5.)

So far as can be judged from the cross-examination of Mr. Flack, the charge of the Court (pp. 15, 16 and 17,) and the only proposition of counsel which appears on the record, (p. 16,) the propriety of the reservation of commissions to the Baltimore house, upon sales made by the Peoria house itself, was the only question mooted. "The position of the defendants is," said his Honor, "that the reservation of commissions on the goods sold by the defendants themselves, was a colorable shift and pretext to avoid the usury laws and obtain a greater rate of interest than is allowed by law." (p. 15.) It was in reference to this position alone that the law of the case was expounded by the Court, and although the Statute of Maryland was given in evidence, by the plaintiffs in error, as stated above, the learned Circuit Judge did not confine the jury to that Statute alone, but left the question of usury open to them, under the Statutes of Illinois as well. (foot of p. 16.) After the charge upon the the general merits had been made and excepted to, a further instruction was given to the jury, (p. 17,) that if they should find any part of the amount due to have been vexatiously withheld by the plaintiffs in error, they would be justified in

giving interest on such amount, at six per cent. per annum from the time that the account was rendered and the demand accrued, which the Court understood to be September 26th, 1873. [This date had been established by the testimony of Mr. Flack, (top of p. 15,) which was uncontradicted.] The plaintiffs in error excepted to this instruction, also.

It will be contended, on the part of the defendants in error, that the law of the case was put to the jury, by the Court, as favorably for the plaintiffs in error as the well-established principles of the law of usury would permit.

I. The Court held, in substance, that the plea of usury is not highly favored by the law; that it must be sustained by strict proof, and that where a contract is susceptible of a non-usurious as readily as a usurious interpretation, it is the duty of the jury to interpret it so as to maintain its legality. It was further charged that the question of usury is one of fact, to be determined by the jury, from all the evidence and from an examination of the contract in the light of all the surrounding circumstances. If the jury, upon such an examination, should find an intention to evade the usury laws of Maryland and Illinois, and that the stipulation for commissions was only a colorable device to give the plaintiffs (below) a higher rate of interest than that allowed by law, then the jury were told that it was their duty to allow neither interest nor commissions. They were further told that if the defendants (below) rested their cause upon the unreasonableness of the particular commissions reserved, they should have shown such commissions to be unreasonable by proper proof, and that the burden of so showing was upon the parties pleading usury.

It is not perceived that the law thus stated is open to just challenge. It is believed to be in entire accordance with the settled rulings of this Court, as well as of the Courts of Illinois and Maryland.

Andrews vs. Pond, 13 Peters, 65, 76.

McGill, vs. Ware, 4 Scam., 21.

Cooper vs. Nock, 27 Ill., 41.
Remback vs. Crabtree, 77 Ill., 183.
Tyson vs. Rickard, 3 Harr. & Johns, 109.
Thomas vs. Catherel, 5 Gill & J., 23.
Duncan vs. Savings Instit., 10 Gill & J., 300.

And see, as to commissions and the *onus* of proving their unreasonableness,

Carstairs vs. Stein, 4 Maule & S., 192.
Seymour vs. Marvin, 11 Barb., 80, 83, 85.
Smith vs. Marvin, 27 N. York, 137.
Trotter vs. Curtis, 19 Johns, 161.

The Maryland Code, in terms, puts upon the party pleading usury the *onus* of proving it. [1 Md. Code, 697, art. 95, sect. 4.]
Williams vs. Banks, 19 Md., 22, 38.

II. Nor can just complaint be made of the application of the law to the facts, in the Court's charge.

The transaction in controversy was not simply a loan of money; it was part of a joint commercial enterprise. The plaintiffs in error were pork-buyers and packers, whose business was to buy hogs, and pack and sell hog products, and who needed funds to assist them in so doing. The defendants in error were commission merchants, whose business was to procure consignments for sale on commission, and whose capital was used for advances upon consignments and to influence business upon which commissions might be made, (Flack, pp. 14 and 15.)

The two houses had been dealing previously with each other, for the first item in the account is a balance of $2,000, which was "the closing up of the previous year's business." (Flack, p. 13.) Flack, Hall & Co. (as appears by their letter of October 22d, 1872, on p. 11,) in which the terms of the contract are set forth), had been making advances, for the two preceding years, to the house of Tyng & Brotherson, when the latter "wished to

buy more hogs than they could themselves manage" Cockle & Dox were desirous of making a similar arrangement for the same reason, and had communicated with the Baltimore house, personally and by letter, on the subject. As a consequence, the contract in dispute was made, limiting the advances sought to $100,000, Flack, Hall & Co. expressly stating, at the same time, that they would not be willing to confine their business with Cockle & Dox to the one operation, but meant to secure a regular trade with the latter: that is to say, shipments to be drawn on in the regular way, "outside of this special arrangement for purchase of hogs," (letter, p. 11.) The regular business indicated consisted in the shipment of cargoes by Cockle & Dox to the order of Flack, Hall & Co., in either Baltimore or New York, with liberty to draw for three-fourths of the home value of the shipments, and with an interest account at 7 per cent. per annum, (p. 11.)

The advances in question were not only not a mere loan of money, as has been said, but were required to be applied to the purchase of hogs, and with the further limitation that Cockle & Dox should be bound to furnish twenty per cent. of their own money for eighty per cent. of the advances as employed. The Peoria house had the privilege of selling the products themselves or of shipping them to Baltimore to be sold, but this privilege was subject to the condition that its exercise should not deprive Flack, Hall & Co. of the stipulated commissions on sales. This provision was manifestly intended to give to Cockle & Dox the choice of their market, but to prevent them, at the same time, from exercising it for the purpose of depriving Flack, Hall & Co. of the business which was the prime object of the arrangement on their part, (Flack, pp. 14 and 15.) It was further warranted and justified by the fact that, as to all sales made by the Peoria house, Flack, Hall & Co. would not only lose the advantage and credit of large consignments, but the security to be derived from the possession of the merchandize and the receipt of the proceeds of sales. The commission

for carrying, after sixty days, was also manifestly reasonable, for the cause assigned in the letter of Flack, Hall & Co., viz: that it would not pay to carry indefinitely for a single commission. It was very obviously the interest of the Baltimore house that the products should be sold and the proceeds either paid over or reïnvested (as it was in the discretion of the Peoria house to do), as rapidly as circumstances would permit. If, therefore, they agreed to forego this proper advantage, it was but fairly prudent to guard against an abuse of the discretion of Cockle & Dox, by not permitting them to retain the goods unsold for a longer period than sixty days, except upon the payment of a further consideration for the privilege. Carrying the goods necessarily involved the contingencies of the market and the possible diminution or loss of the security which the value of the merchandise afforded, for the fulfilment of the engagements of the packers to Flack, Hall & Company. Mr. Flack had testified, (pp. 14, 15,) without objection, that the charge of commissions was not made for the advance of the money. That was paid for by the interest reserved. The advances were made in the course of the trade of Flack, Hall & Co. in order to bring them back business out of which their profits as commission merchants might be earned. The plaintiffs in error never suggested until the trial that there was any unreasonableness in the commissions or in any part of the arrangement. They not only entered into it deliberately, but ratified it after the advances had been made, and furnished the defendants in error with the materials for stating the account sued on, and for the express purpose of enabling them to state it. (Flack, p. 15.)

The considerations thus set forth were proper to be submitted to the jury, as bearing directly upon the question of intention on which it was their province to pass. It will be respectfully insisted that they were presented by the charge with absolute fairness and in entire conformity with the rules of law governing their application.

See, as to the legality of extra interest, where the party may at his discretion, under the contract, prevent its accruing, and it has, practically, the effect of a penalty,

Pollard, vs. Baylor, 6 Munf., 433.
Lloyd vs. Scott, 4 Peters, 226.
Dorsey vs. Beach, 78 Ill., 53.
3 Parsons on Cont., 6th Edit., p. 116 and note *S.*

Even if the Court should be regarded as having erred in any particular, (which is denied,) the most adverse criticism can hardly suggest that it erred in all, and unless it did err in all, the judgment cannot be reversed, under the general exception taken to the charge, as this Court has recently held in Beaver vs. Taylor, (Oct. Term 1876, No. 50.)

III. The separate subsequent instruction allowing (but not directing) the jury to give six per cent. interest, from the time the account was rendered and the demand accrued, upon any amount which they might find to have been vexatiously withheld, is in entire conformity with the local law and practice existing since 1845. The statute of Illinois concerning interest, sect. 2, provides as follows:

"Creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, *or other instrument of writing,* . . . . likewise *on money lent,* on *money due on the settlement of accounts from the day of liquidating accounts between the parties and ascertaining the balance*: on money received to the use of another and retained without the owner's knowledge, and on *money withheld by an unreasonable and vexatious delay of payment.*"

Revised Statutes of Illinois, (1845,) p. 585.
Gross' Revision of 1871, p. 370.
Revised Statutes of 1874, p. 614.

Whether or not there had been a vexatious delay of payment was a question for the jury, under the local decisions, and was therefore properly left to them by the Circuit Judge, if that question arose.

Kennedy vs. Gibbs, 15 Illinois, 406.
Davis vs. Kanaga, 51 Illinois, 170.

But it seems clear that in the case at bar the defendants in error were entitled to interest as a matter of right, under the earlier clauses of the section quoted above, and that no vexatious withholding was necessary to justify the jury in giving it. If the money was not due on an "instrument of writing," or as "on money lent," it certainly was "money due on the settlement of accounts."

It was the uncontradicted evidence (Flack at foot of p. 14,) that it was "the custom and usage of the trade," to charge interest on the balance of account rendered, as was done in the account here sued on. By the very terms of the contract itself, remittance was to be made "immediately" by Cockle & Dox, of the proceeds of the pork sold by them. All the advances made by Flack, Hall & Company were evidenced by sight drafts drawn for various sums and at various dates under the contract. Not an element of the right to recover interest was wanting in the case.

"Interest," says this Court, "as a general rule, is due on a debt from the time that payment is unjustly refused."

Aurora City vs. West, 7 Wallace, 105.

IV. Although the Maryland Statute of Usury was given in evidence by the plaintiffs in error, (p. 15) the Court left it to the

jury to find a corrupt intention, under either the Maryland or the Illinois Statute, or both. The Maryland Statute allows only six per cent. per annum, and forfeits "*the excess* above the legal interest," (1 Md. Code, p. 697, sect. 4,) not "all interest" as erroneously stated in the Record, (p. 15.) The Illinois Statute allows ten per cent. conventional interest, but forfeits all interest in case of usury. (Session Laws of 1857, Feb. 16, p. 33, sects. 2 and 3.) The Circuit Court appears to have had in view the reasoning in Andrews vs. Pond, 13 Peters, 78, and to have held that even if the contract was to be performed in Illinois, where a higher rate of interest was allowable, the transaction was still usurious, if it were a shift or pretext to evade the laws of Maryland. Certainly therefore the plaintiffs in error cannot complain of want of latitude to establish a corrupt intent, if they could.

Whatever difficulty might otherwise have existed, as to the law by which the legality of the interest was to be tested: whether it was a Maryland or an Illinois contract, (Wharton's Conflict of Laws, sects. 421 to 423): whether the Illinois law was to be adopted, as best sustaining the validity of the contract, (Wharton, sects. 506, 507,) or as the law of the place where the money was to be used, (Id. 508 to 510;) all such difficulty was removed by the Statute of Illinois, (Session Laws, Feb. 12, 1857, p. 38, sect. 1,) whereby it was enacted that any contract between citizens of Illinois and those of any other state or country, reserving interest lawful in Illinois, should be considered as governed by the law of Illinois, no matter where the money might be payable. (And see Sess. Laws, 16th Feb., 1857, p. 33.) The reservation of 10 per cent. conventional interest, in this case, was therefore properly not made the subject of controversy below, and the Court obviously acted under the Illinois Statute, in excluding all interest, and not merely the excess, in case usury should be found by the jury.

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